Tan Sri G Darshan Singh v Loke Kee Development Sdn Bhd and Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–1040 OF 2007
MOHD YAZID JC
10 OCTOBER 2008

Civil Procedure — Striking out — Whether action against defendants should be struck out — Whether white knight agreement executed between first and second defendant rendered latter liable to plaintiff

Civil Procedure — Summary judgment — Appeal — Triable issues — Whether first defendant had raised triable issues — Whether Asian financial and economic crisis causing delay in completion of condominium project was triable issue

Land Law — Housing developers — Delay in completion — Delivery of vacant possession — Time of essence — Claim by plaintiff for liquidated ascertained damages under sale and purchase agreement — Whether plaintiff entitled to liquidated ascertained damages — Whether first defendant under statutory contractual duty to complete condominium project on time

The plaintiff entered into a sale and purchase agreement ('the SPA') to purchase a condominium unit from the first defendant, housing developer, for the purchase price of RM314,000. It was a term of the SPA that failure to deliver vacant possession would result in the first defendant's liability to pay liquidated ascertained damages ('LAD') to the plaintiff calculated at the rate of ten per cent per annum on the purchase price on a day to day basis. The Asian financial and economic crisis ('the crisis') inadvertently affected the first defendant's financial standing and led to the first defendant's inability to deliver vacant possession of the condominium unit to the plaintiff within the stipulated time although time was of the essence of the contract. During this crisis, a practice existed amongst members of the construction industry to appoint 'white knights' to revive abandoned housing projects. In keeping with this practice the first defendant executed an agreement with the second defendant ('the white knight agreement') to revive the abandoned condominium project and to procure the purchasers' (including the plaintiff's) agreement to waive their rights to LAD. At the same time a clause was inserted into the white knight agreement whereby the first defendant

would continue to be liable for LAD for its failure to deliver vacant possession within 36 months from the date of the SPA. However, at all material times the plaintiff never agreed to waive his right to claim for LAD for late delivery of vacant possession of his condominium unit. The plaintiff proceeded to institute its claim against the defendants for LAD for late delivery of vacant possession of the condominium unit, interest and costs. Thereafter the plaintiff applied for and obtained summary judgment against the defendants. This was the first defendant's appeal against the decision to allow the plaintiff summary judgment. The first defendant neither denied that it was late in delivering vacant possession nor denied that the plaintiff had not waived his right to LAD but it submitted that the crisis, which was the reason for the first defendant's inability to deliver vacant possession, was a triable issue for the court to consider. It also submitted that the summary judgment would defeat the white knight practice amongst members of the construction industry. The first defendant further submitted that the plaintiff's failure to complaint about the continuation of the project by the second defendant amounted to acquiescence and that therefore the plaintiff could not now claim for LAD when his unit had been completed and delivered to him. In the meantime the second defendant applied to strike out of the plaintiff's claim against it. The second defendant submitted that its role was to only revive the abandoned condominium project, which it had done, in accordance to the white knight agreement with the first defendant and that it was therefore not financially liable to the plaintiff. This striking out application was allowed and the plaintiff appealed against that decision allowing the striking out application. The issues before the court were whether there were triable issues between the plaintiff and the first defendant and whether the white knight agreement executed between the first and second defendant made the latter liable to the plaintiff.

Held, dismissing the appeals with costs:

(1) Under reg 11(1) and (3) of the Housing Developers (Control and Licensing) Regulations 1989, if the first defendant wanted to be exempted from laying LAD to the plaintiff for late delivery of vacant possession of the condominium unit, then it would need to obtain the controller's written consent for exemption. However, in the present suit, the first defendant had not forwarded any such evidence to justify its stand that it's not liable for LAD (see para 14).

(2) The first defendant was not only morally responsible to complete the plaintiff's condominium unit but also under a contractual duty to complete the condominium project under the SPA that stems from a statute ie the Housing Developers (Control and Licensing) Act 1966. Thus the fact that the first defendant was unable to complete the

condominium project because it was financially affected by the crisis did not detract from this statutory contractual duty. In fact, since the plaintiff had paid the purchase price under the SPA he was contractually entitled to receive the delivery of the condominium unit, and in the event of late delivery of vacant possession the SPA went to provide the plaintiff LAD. The SPA did not exempt the first defendant from paying LAD because of any financial damages. Neither did the appointment of the second defendant to revive the abandoned condominium project exempt the first defendant from its liability to pay the plaintiff LAD. The plaintiff's refusal to agree to the condition to waive his rights to claim for LAD for late delivery of vacant possession of the condominium unit also did not release the first defendant from its statutory contractual duty to pay LAD. Therefore there were no triable issues between the plaintiff and the first defendant and the plaintiff was entitled to claim for LAD (see paras 15, 16 & 21).

(3) The second defendant was appointed to only revive the abandoned condominium project and not to replace the first defendant as the 'vendor' in the SPA between the plaintiff and the first defendant. Furthermore the preamble to the white knight agreement clearly stipulated that it was the first defendant that was liable to pay the LAD for delivery of vacant possession and not the second defendant. Therefore the second defendant was not liable to the plaintiff (see para 8).

[Bahasa Malaysia summary

Plaintif memasuki satu perjanjian jual beli ('PJB') untuk membeli satu unit kondominium daripada defendan pertama, pemaju perumahan, untuk harga belian sebanyak RM314,000. Ia adalah salah satu daripada terma PJB bahawa kegagalan untuk menyerahkan milikan kosong akan mengakibatkan liabiliti bagi defendan pertama untuk membayar ganti rugi tertentu yang ditetapkan ('GTD') kepada plaintif yang dikira pada kadar sepuluh peratus setahun daripada harga belian dengan kadar harian. Krisis kewangan dan ekonomi Asia ('krisis tersebut') secara tidak langsung menjejaskan kedudukan kewangan defendan pertama dan membawa kepada ketidakmampuan defendan untuk menyerahkan milikan kosong unit kondominium tersebut kepada plaintif dalam tempoh masa yang ditetapkan walaupun masa adalah intipati kontrak tersebut. Semasa krisis ini, satu amalan wujud di kalangan ahli-ahli industri pembinaan untuk melantik 'penyelamat' ('white knight') untuk memulihkan projek-projek perumahan yang terbengkalai. Dalam meneruskan dengan amalan ini defendan pertama melancarkan satu perjanjian dengan defendan kedua ('perjanjian penyelamat') untuk memulihkan projek kondominium yang terbengkalai tersebut dan untuk mendapatkan perjanjian pembeli-pembeli (termasuk plaintif) untuk

mengenepikan hak-hak mereka kepada GTD. Pada masa yang sama satu klausa dimasukkan ke dalam perjanjian penyelamat di mana defendan pertama akan terus bertanggungjawab untuk GTD kerana kegagalannya untuk menyerahkan milikan kosong dalam masa 36 bulan dari tarikh PJB. Walau bagaimanapun, dalam semua masa yang material plaintif tidak pernah bersetuju untuk mengenepikan haknya untuk menuntut GTD kerana lambat menyerah milikan kosong unit kondominiumnya. Plaintif seterusnya melaksanakan tuntutan terhadap defendan-defendan untuk GTD bagi penyerahan lambat milikan kosong unit kondominium tersebut, faedah dan kos-kos. Kemudian plaintif memohon untuk dan memperolehi penghakiman terus terhadap defendan-defendan. Ini adalah rayuan defendan pertama terhadap keputusan untuk membenarkan penghakiman terus plaintif. Defendan pertama tidak menafikan bahawa ia lambat dalam menyerahkan milikan kosong atau menafikan bahawa plaintif tidak mengenepikan haknya kepada GTD tetapi ia menghujah bahawa krisis tersebut, yang merupakan sebab ketidakupayaan defendan pertama untuk menyerahkan milikan kosong, adalah satu isu yang boleh dibicarakan untuk mahkamah menimbangkannya. Ia juga menghujah bahawa penghakiman terus akan menggagalkan amalan penyelamat di kalangan ahli-ahli industri pembinaan. Defendan pertama seterusnya menghujah bahawa kegagalan plaintif untuk mengadu berkenaan penerusan projek tersebut oleh defendan kedua bermaksud persetujuan dan oleh itu plaintif tidak boleh sekarang menuntut GTD apabila unitnya telah disiapkan dan diserahkan kepadanya. Sementara itu defendan kedua memohon untuk membatalkan tuntutan plaintif terhadapnya. Defendan kedua berhujah bahawa peranannya hanyalah untuk memulihkan projek kondominium yang terbengkalai, yang mana telah dilakukannya, selaras dengan perjanjian penyelamat dengan defendan pertama dan oleh itu ia tidak bertangggungjawab secara kewangan kepada plainitif. Permohonan pembatalan telah dibenarkan dan plaintif merayu terhadap keputusan membenarkan permohonan pembatalan tersebut. Isu-isu di hadapan mahkamah adalah sama ada terdapat isu-isu yang boleh dibicarakan di antara plaintif dan defendan pertama dan sama ada perjanjian penyelamat yang dilaksanakan di antara defendan pertama dan kedua menyebabkan defendan kedua bertanggungjawab terhadap plaintif.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Di bawah peraturan 11(1) dan (3) Peraturan Pemaju Perumahan (Kawalan dan Perlesenan) 1989, jika defendan pertama ingin dikecualikan dari mengenakan GTD kepada plaintif kerana lambat menyerahkan milikan kosong unit kondominium tersebut, maka ia perlu memperolehi kebenaran bertulis pengawal untuk pengecualian. Walau bagaimanapun, dalam guaman ini, defendan pertama tidak

mengemukakan sebarang keterangan sedemikian untuk menjustifikasi kedudukannya bahawa ia tidak bertanggungjawab untuk GTD (lihat perenggan 14).

(2) Defendan pertama tidak hanya bertanggungjawab secara moral untuk menyiapkan unit kondominium plaintif tetapi juga di bawah satu tanggungjawab kontrak untuk menyiapkan projek kondominium di bawah PJB yang bermula dari statut iaitu Peraturan Pemaju Perumahan (Kawalan dan Perlesenan) 1966. Oleh itu fakta bahawa defendan pertama tidak berupaya untuk menyiapkan projek kondominium tersebut kerana ia terjejas secara kewangan oleh krisis tersebut tidak mengecualikannya daripada tanggungjawab statutori kontrak ini. Malahan, memandangkan plaintif telah membayar harga belian di bawah PJB dia adalah secara kontrak berhak untuk menerima penyerahan unit kondominium tersebut, dan dalam keadaan penyerahan lambat milikan kosong PJB memberikan plaintif GTD. PJB tidak mengecualikan defendan pertama dari membayar GTD disebabkan oleh sebarang kerugian dari segi kewangan. Ia juga tidak menyebabkan pelantikan defendan kedua untuk memulihkan projek kondominium terbengkalai mengecualikan defendan pertama daripada tanggungjawabnya untuk membayar GTD kepada plaintif. Keengganan plaintif untuk bersetuju dengan syarat untuk mengenepikan hak-haknya untuk menuntut GTD bagi penyerahan lambat milikan kosong unit kondominium tersebut juga tidak membebaskan defendan pertama daripada tanggungjawab kontrak statutori untuk membayar GTD. Oleh itu tidak terdapat isu-isu yang boleh dibicarakan di antara plaintif dan defendan pertama dan plaintif adalah berhak untuk menuntut GTD (lihat perenggan 15, 16 & 21).

(3) Defendan kedua dilantik untuk hanya memulihkan projek kondominium terbengkalai tersebut dan bukan untuk menggantikan defendan pertama sebagai 'vendor' di dalam PJB di antara plaintif dan defendan pertama. Seterusnya pembukaan kepada perjanjian penyelamat jelas menyatakan bahawa defendan pertama yang bertanggungajawab untuk membayar GTD bagi penyerahan milikan kosong dan bukan defendan kedua. Oleh itu defendan kedua tidak bertanggungjawab kepada plaintif (lihat perenggan 8).]

Notes

For a case on whether action against defendants should be struck out, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 6795.

For cases on appeal see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6883–7049.

For cases on delay in completion see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2856–2860.

Cases referred to

Sentul Raya Sdn Bhd v Hariram Jayaram & Ors [2008] 4 MLJ 852; [2008] 4 CLJ 618, CA (refd)

Legislation referred to

Housing Developers (Control and Licensing) Act 1966 s 24, Schedule H
Housing Developers (Control and Licensing) Regulations 1989 reg 11(1), 11(3)
Rules of the High Court 1980 O 18 r 19

G Darshan Singh (Shir Dar Singh with him) (Darshan, Syed, Amarjit & Partners) for the plaintiff.
CC Lim (Hazman Tan) for the first defendant.
SY Ying (Azami Lim & Pang) for the second defendant.

Mohd Yazid JC:

INTRODUCTION

[1] I had, on 23 June 2008, dismissed both encll 27 and 24 ie the plaintiff's appeal against the decision of the senior assistant registrar in allowing the second defendant's striking out application in encl 21 and the first defendant's appeal against the decision of the senior assistant registrar's in allowing the plaintiff's summary judgment application in encl 9.

[2] The plaintiff's summary judgment application in encl 9 against the first and second defendant is for liquidated ascertained damages for late delivery of vacant possession of a condominium unit amounting to RM334,691.64, interest at the rate of 10% per annum on RM334,691.64 from 10 September 2007 until full settlement and costs.

[3] The second defendant is applying through encl 21 under O 18 r 19 of the Rules of the High Court 1980 ('RHC') to strike out the plaintiff's claim.

SUMMARY OF FACTS

[4] On 7 September 1995, the plaintiff and the first defendant entered into a sale and purchase agreement ('the sale and purchase agreement') for the sale and purchase of a unit at Sri Emas Condominium ('the condominium unit') for the purchase price of RM314,010 ('the purchase price'). Time was of the essence of the contract as stipulated in cl 7 of the sale and purchase agreement (exh DSG-1 encl 9).

[5] It is also a term of the sale and purchase agreement that 'vendor' ie the first defendant also includes its successors in title and permitted assigns (cl 31(h)) and that the sale and purchase agreement would be binding on the successors in title and permitted assigns of the first defendant, the heirs, personal representatives, successors in title and permitted assigns of the plaintiff (cl 32).

[6] Vacant possession of the property and completion of common facilities were to be given to the plaintiff 36 months from the date of the agreement as stipulated by cl 22(1) and cl 24(1) of the sale and purchase agreement ie on 7 September 1998. The said date came and vacant possession was not handed to the plaintiff.

[7] Clause 22(2) and cl 24(2) of the sale and purchase agreement stipulate that failure to deliver vacant possession complete with common facilities will result in the first defendant's liability to pay liquidated ascertained damages to the plaintiff. Clause 22(2) of the sale and purchase agreement stipulates that liquidated ascertained damages for late delivery of vacant possession are to be calculated at the rate of 10% per annum on the purchase price on a day to day basis.

[8] On 15 September 2005, the first defendant executed a 'white knight' agreement with the second defendant ('the white knight agreement') (exh DSG-3 encl 9). The second defendant's role was to revive the abandoned condominium project (cl 2(a)) and to procure the purchasers' (including the plaintiff's) agreement to waive their rights to liquidated ascertained damages (cl 2(e)). Clause 2(e) of the white knight agreement was inserted notwithstanding preamble (g) where it is clearly stated that the first defendant would continue to be liable for liquidated ascertained damages for its failure to deliver vacant possession within 36 months from the date of the sale and purchase agreement.

THE FIRST DEFENDANT'S CONTENTION

[9] The first defendant argue that the reason vacant possession could not be delivered within the stipulated time and the fact for the appointment of the second defendant is attributed to the Asian financial and economic crisis in the late 1990s that inadvertently affected the financial standing of the first defendant. The first defendant is not denying that they were late in delivering vacant possession or that the plaintiff has never, at all material times, waived his right to liquidated ascertained damages. The first defendant's argument is that the Asian financial crisis is a triable issue for the court to consider because granting summary judgment would defeat the practice amongst the construction industry in appointing 'white knights' to revive abandoned

housing projects. The fact that the plaintiff had never complained about the continuation of the said project by the second defendant amounts to acquiescence. The plaintiff cannot now claim for liquidated ascertained damages when his unit has been completed and delivered to him.

THE SECOND DEFENDANT'S CONTENTION

[10] The second defendant's argument in applying for the striking out of the plaintiff's claim against them is that the second defendant is not financially liable towards the plaintiff for any late delivery of vacant possession. The second defendant's role is merely to revive the condominium project which they have duly done in accordance to the 'white knight' agreement with the first defendant.

THE PLAINTIFF'S ARGUMENT

[11] The plaintiff's argument is that at all material times, he has never agreed to waive his right to claim for LAD for late delivery of vacant possession of his condominium unit. The plaintiff contends further that he has never agreed to the appointment of the second defendant to complete his unit. Therefore, the first defendant is liable to pay LAD. The second defendant has agreed with the first defendant to be responsible towards the plaintiff by virtue of cl 3 of the 'white knight' agreement. If it were otherwise, the said cl 3 would not have been inserted.

THE LAW

[12] The first defendant is a housing developer and the property in question is a condominium unit. The relevant statutory provision regulating and controlling the activity of the first defendant is reg 11(1) of the Housing Developers (Control and Licensing) Regulations 1989 enacted pursuant to the Minister's powers under s 24 of the Housing Developers (Control and Licensing) Act 1966. For ease of reference, regulation 11(1) is reproduced below:

> Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G *and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.*

[13] Clause 22(1) and cl 22(2) of the sale and purchase agreement are reproductions of the relevant provisions under Schedule H of the Housing

Developers (Control and Licensing) Act 1966. Regulation 11(3) provides for an exception to the housing developers duty that stipulates that:

> Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:
>
> Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller.

FINDING

[14] From a reading of regs 11(1) and (3), it is clear that for the first defendant to exempt itself from its statutory obligations towards the plaintiff viz to be exempted from paying liquidated ascertained damages for late delivery of vacant possession of the property, the first defendant would need to obtain the controller's written consent for exemption and the application has to be made before the 36 months had expired. In the present suit, the first defendant has not forwarded any such evidence to justify its stand that it is not liable for liquidated ascertained damages.

[15] I find that the plaintiff has never waived his rights to claim for liquidated ascertained damages for late delivery of vacant possession of his condominium unit. The first defendant is not merely morally responsible to complete the condominium project including the plaintiff's unit. The first defendant has a contractual duty to perform under cl 22 and cl 24 of the sale and purchase agreement that stems from a statute viz the Housing Developers (Control and Licensing) Act 1966.

[16] The fact that the first defendant was financially affected by the Asian financial crisis thus unable to complete the condominium project on time does not detract from this statutory contractual duty. Here, I would pause to refer to the recent decision of the Court of Appeal in *Sentul Raya Sdn Bhd v Hariram Jayaram & Ors* [2008] 4 MLJ 852 at p 859; [2008] 4 CLJ 618 at p 626 para 8 where His Lordship Gopal Sri Ram JCA held

> In our opinion there is no merit in the appellant's argument. So far as s 56(3) of the Contracts Act 1950 is concerned, it deals with contracts generally. The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed.

> So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract. It follows that the requirement of notice under s 56(3) which is an additional obligation to the detriment of the purchaser cannot be imposed on the respondents here in the light of the statutory scheme under the Act. *This is evident in the language of cl 22(2). On its proper construction, the clause makes a housing developer immediately liable to a purchaser in liquidated damages once the date for completion passes. Put differently, cl 22(2) excludes the operation of s 56(3)*. This is another reason for holding that s 56(3) of the Contracts Act 1950 does not apply in cases falling under the Act.

[17] It is an undisputed fact that the plaintiff has paid the purchase price. Under the sale and purchase agreement and even under general contract law, the plaintiff is contractually entitled to receive consideration ie the delivery of his condominium unit. The sale and purchase agreement goes further to provide the plaintiff, as a purchaser, protection against the eventuality that vacant possession of the unit is delivered late in the form of liquidated ascertained damages.

[18] The sale and purchase agreement does not exempt the first defendant from paying liquidated ascertained damages because of any financial problems. I would once again refer to the above decision of the Court of Appeal at p 861 (MLJ); p 628 (CLJ) para 13:

> Applying the foregoing test, we are of the view that the defence of frustration is not available to the appellant. The 1997 financial crisis merely made it more onerous or perhaps more expensive for the appellant to perform its obligations. It did not render the contract radically different. There is a further reason why the plea of frustration should fail. Under reg 11(3) of the Regulations it was open for the appellant to make representations to the controller of housing — to quote from the Regulation — 'owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary'. In our judgment reg 11(3) clearly excludes the operation of the doctrine of frustration in respect of contracts regulated by the Act.

[19] The fact that there was a third party ie the second defendant being appointed to revive the abandoned condominium project also does not exempt the first defendant from liability to pay liquidated ascertained damages.

[20] It is pertinent to note that the first defendant had imposed an additional condition which is onerous on the purchasers to which the plaintiff had refused to acquiesced ie that liquidated ascertained damages be waived before the abandoned condominium project was to be revived by the second defendant. The plaintiff's refusal to agree to this onerous condition

also does not release the first defendant from its statutory contractual duty to pay liquidated ascertained damages. The reason is the operation of cl 22(2) of the sale and purchase agreement.

[21] Therefore, I find that there are no triable issues between the plaintiff and the first defendant. The plaintiff is entitled to claim for liquidated ascertained damages.

[22] The second defendant was appointed to revive the abandoned condominium project and not to replace the first defendant as the 'vendor' in the sale and purchase agreement between the plaintiff and the first defendant. It is clear that cl 3 of the 'white knight' agreement states that the second defendant is under no obligation to complete any units to which the purchaser has not agreed to appoint the second defendant as the 'white knight'.

[23] The plaintiff has clearly denied his agreement to appoint the second defendant to complete his unit. However, it is practically impossible for the second defendant to complete the condominium project without also completing the plaintiff's unit. To do otherwise is impractical. Furthermore, Preamble *g* of the 'white knight' agreement clearly stipulates that it is the first defendant which is liable to pay LAD for late delivery of vacant possession and not the second defendant. Therefore, the second defendant is not liable towards the plaintiff.

[24] Based on the above reasons, I had:

(i) dismissed the first defendant's appeal in encl 24 and upheld the summary judgment against the first defendant for RM334,691.64; interest at the rate of 8% per annum on RM334,691.64 from the date of judgment until full settlement with costs; and

(ii) dismissed the plaintiff's appeal in encl 27 and upheld the order to have the writ and statement of claim against the second defendant struck out with costs.

Appeals dismissed with costs.

Reported by K Nesan